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April 9, 2001

RICHARD J. METZGER
VICE PRESIDENT – REGULATORY
AND PUBLIC POLICY

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Notice of Ex Parte Presentation*
Access Charge Reform, CC Docket No. 96-262; *Request for Emergency Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance*, DA 00-1067; *Mandatory Detariffing of CLEC Interstate Access Services*, DA 00-1268

On April 6, 2001, Richard J. Metzger, Vice President of Regulatory Affairs, Focal Communications Corporation ("Focal"), and Richard M. Rindler and Patrick J. Donovan of Swidler Berlin Shereff Friedman LLP, met with Jeff Dygert and Scott Bergmann of the Common Carrier Bureau concerning issues in the above-captioned proceedings. The specific subject matter was AT&T's recent Notice of *Ex Parte* Presentation[1] requesting the Commission to set any benchmark rate for CLEC terminating switched access services and originating 8YY traffic at a level no higher than the ILEC rate without a transition period. Focal presented the following views at the April 6th meeting.

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List A B C D E

[1] *Access Charge Reform*, CC Docket No. 96-262; *Request for Emergency Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance*, DA 00-1067; *Mandatory Detariffing of CLEC Interstate Access Services*, DA 00-1268, AT&T Notice of *Ex Parte* Presentation (March 29, 2001) ("*AT&T Ex Parte*")

Terminating Switched Access Charges

AT&T asserts that a local exchange carrier has a "locational monopoly" over a customer that leads to "supracompetitive" terminating access charges.[2] The record in this proceeding has not elicited the presence of such supracompetitive access charges in general, much less terminating access charges. It is telling that AT&T admits, by its own estimation, that only 12% of CLECs are charging switched access charge rates higher than the corresponding incumbent local exchange carrier ("ILEC") rate.[3] Only 10% of CLECs are charging access rates higher than 2.5 cents per minute of use ("MOU") and only 6% charge more than 5.0 cents per MOU.[4] The 5 cent per minute figure is a significant one because this is believed to be the rate that AT&T and WorldCom have negotiated with certain CLECs for switched access charges on a long-term basis.[5] The 5 cent figure also falls within the range of what smaller ILECs charge.[6] ACC National Telecom Corp., an affiliate of AT&T, charged access rates of 9 cents per minute.[7]

As Focal demonstrated in its initial comments, the rates of the smaller ILECs, such as the NECA companies and independents, are a better point of comparison for CLECs as NECA company cost structure is more reflective of the CLEC cost structure.[8] The average rate for originating and terminating switched access of the CLECs that participated in the survey conducted by ALTS was 4.27 cents per minute.[9] Importantly, the rates for terminating access service were on average, no higher, than those for originating access service. Focal's access charges, along with other major CLECs, were shown to be within the range of ILEC tariffed charges.[10]

In short, AT&T has not established a case for its proposed transition 1.2 cent per minute benchmark, much less that CLECs should be immediately required to charge the ILEC rates for terminating access. In fact, AT&T concedes that most CLECs "<u>already</u>

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2 CC Docket Nos. 96-262, 94-1, 98-157 and CCB/CPD File No. 98-63, AT&T Reply Comments on LEC Pricing Flexibility FNPRM at 28 (Nov. 29, 1999) ("*AT&T 1999 Reply Comments*").

3 CC Docket Nos. 96-262 and 97-146 and CCB/CPD File No. 98-63, AT&T Additional Comments at p. 7 (January 11, 2001)("*AT&T Comments*").

4 *Id.*

5 CC Docket Nos. 96-262 and 97-146, *Ex Parte Filing* of Focal Communications Corporation at p. 1 (Sept. 29, 2000)("*Focal Ex Parte*") *citing*, RBC Dominion Securities, *Switched Access Revenues Will Probably Become the Next CLEC "Overhang" Issue, But We Believe Concerns in Many Cases are Unwarranted*, at p. 5 (Aug. 24, 2000)("*RBC Report*").

6 *RBC Report* at p. 2 (Smaller independent LECs who are collectively represented by NECA tend to have access charges in the 4.5 cent to 8 cent per minute range).

7 CC Docket No. 96-262 and 97-146, Comments of the Association for Local Telecommunications Services at 7 (Jan. 11, 2001).

8 CC Docket Nos. 96-262 and 97-146 and CCB/CPD File No. 98-63, Comments of Focal Communications Corporation, RCN Telecom Services, Inc. and Winstar Communications, Inc., at pp. 24-25 (January 11, 2001)("*Initial Comments*").

9 CC Docket Nos. 96-262 and 97-146, Comments of the Association of Local Telecommunications Services at p. 7 (January 11, 2001)("*ALTS Comments*").

10 *RBC Report* at pp. 1 and 5.

maintain identical (or virtually identical) originating and terminating switched access rates."[11]

Originating 8YY Calls

AT&T argues in its recent *Ex Parte* that originating 8YY traffic should be priced at the ILEC rate immediately. The only mention in the Further Notice of Proposed Rulemaking of CLEC 8YY traffic concerned whether originating 8YY minutes should be treated as termination access service, an approach which Focal has no quarrel with.[12] Focal denies that AT&T's 8YY proposal is within the scope of the FNPRM. It is also worth noting that AT&T has surely been aware of any practice of paying commissions to premise owners for CLEC 8YY traffic since it acquired ACC, a CLEC, which upon information and belief used to follow such a practice even after it was acquired by AT&T. AT&T should have made its proposal to address this issue far earlier in this proceeding. The Commission has been reluctant to take actions in rulemaking that are raised initially in *ex parte* filings and not supported in the record of the proceeding.[13]

AT&T also fails to show how there is a market distortion in regard to 8YY access pricing. As a general matter, there are no cost or marketing differences between 8YY traffic and other switched access traffic that would create any increased potential for pricing abuses. There is no appreciable difference in the cost of provisioning 8YY access service compared to other switched access service. Furthermore, the potential for similar inducements exist for non-8YY access traffic via contract pricing, or via reductions in the total price of bundled access/local service. In fact, issuing commissions is more expensive for CLECs to administer than simply offering a total bundled discounted price. Thus, there is no record support for the draconian action AT&T calls for, and to impose such a requirement would unduly limit cost-recovery for CLECs to cure a problem that simply has not been shown to exist.

In short, the Commission should reject AT&T's 8YY proposal because of lack of notice, lack of record support, and because the proposed remedy is unnecessarily severe. However, to the extent the Commission determines that it needs to adopt measures specifically addressing 8YY traffic, the Commission should be guided by the following bedrock principle previously enunciated in this proceeding:

> [w]e strongly prefer not to intervene in the marketplace, particularly with respect to competitive new entrants, unless intervention is necessary to fulfill our statutory obligation to ensure just and reasonable rates. If

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[11] *AT&T 1999 Reply Comments* at p. 33 (emphasis in original).

[12] *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition for U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63, and CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, at ¶ 237 (August 27, 1999)("*Pricing Flexibility Order*")

[13] *See MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000).

market forces are not operating to constrain CLEC access charges, we seek the least intrusive means possible to correct any market failures.[14]

Focal handles more non-8YY access traffic than 8YY traffic, and its access rates for the two are identical. Focal has discontinued commission payments for new customers, and even if commission payments for existing customers were factored into its access rates, its access rates would still be substantially lower than the 4.27 cent per minute CLEC average. In a recently completed negotiation with one of the large IXCs, no special treatment was required for 8YY traffic. Thus, there is no basis for application of any special regulation of 8YY traffic with respect to Focal. The Commission should assure that any regulation of 8YY traffic does not adversely affect Focal's business practices.

Attached is a comparison of CALLS and possible reciprocal compensation and CLEC access charge transition plans, which was provided at the meeting.

Sincerely,

Richard J. Metzger
Vice President of Regulatory Affairs
Focal Communications Corporation

Enclosure

cc: Jeff Dygert
Scott Bergmann

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[14] *Pricing Flexibility Order* at ¶ 256.

A Comparison of Three Transition Plans

	CALLS	Recip Comp	Access Charges
Rate element	Local switching	Local switching	Local switching
Original rate	1.100¢/MOU[1]	0.275¢/MOU[2]	4.270¢/MOU[3]
Target rate	0.550¢/MOU[4]	0.070¢/MOU	0.550¢/MOU[4]
Percentage rate reduction	50%	74.5%	87.1%
Duration	5 years[5]	3 years	3 years
Total reduction	$2.1B[6]	$1.5B[7]	$1.3B[8]
Total revenues	$100B[9]	$9.5B[10]	$9.5B[10]
Reduction as % of total	2.1%	15.8%	13.7%
Change in stock prices since 01/01/01	- 3.4%[11]	- 33.3%[11]	- 33.3%[11]
Average debt ratings	AA	B2/B – Caa1/B-[11]	B2/B - Caa1/B[11]

1. Access Charge Reform, Sixth Report and Order (CALLS), CC Docket No. 96-262, released May 31, 2000, at para. 176.
2. October 12, 2000, ex parte of BellSouth, Verizon, SBC and Qwest. See also the October 20, 2000, ex parte filed by Allegiance, Focal, Intermedia, Time Warner Telecom, and XO at Attachment A (average recip comp rate of .27 cents/MOU, weighted by access lines).
3. ALTS comments in CC No. 96-262 filed January 11, 2001, Att. 1-7, pp. iii, 7.
4. CALLS at para. 176.
5. Id.
6. Id. at para. 151. Actual ILEC impact was reduced by $650M in universal service payments and higher end user payments (para. 146).
7. March 23, 2001, ex parte of ALTS and CompTel, Scenario 5.
8. Estimated access revenues are 20% of $7.5B total CLEC local revenues.
9. As of year-end 1999, Credit Suisse First Boston, Telecom Services – CLECs, March 2001, pp. 7-9.
10. State of Local Competition. ALTS, February 2001, p. 26 ($7.5B), plus $2.0B in recip comp (BellSouth, et al., ex parte filed December 22, 2000) = $9.5B.
11. Morgan Stanley Dean Witter, CLEC Industry Research, April 3, 2001, pp.5,10.